No. 75-679

In the Supreme Court of the United States

OCTOBER TERM, 1976

INTERNAL REVENUE SERVICE, PETITIONER

v.

FRUEHAUF CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER IN SUPPORT OF MOTION TO VACATE AND REMAND

DANIEL M. FRIEDMAN,
Acting Solicitor General,

MYRON C. BAUM,
Acting Assistant Attorney General,

STUART A. SMITH,
Assistant to the Solicitor General,

JOSEPH L. LIEGL,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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1. Respondents' opposition to our motion to vacate and remand this case to the court of appeals for consideration of whatever issues may remain unresolved in the light of the Tax Reform Act of 1976 ignores "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711. As the Court there pointed out, the rule originates in *United States* v. *Schooner Peggy*, 1 Cranch 103, 110, where Chief Justice Marshall stated: "But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

The principle of *Schooner Peggy* is fully applicable to this case. Since the Court's grant of certiorari, the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520, was enacted into law on October 4, 1976. Section 1201(b) of the Act (Motion to Vacate, App. 8a) provides that the new statute is effective with respect to pending Freedom of Information Act litigation. Thus, it is the new statute, and not the judgment of the court of appeals, that provides the operative rules for the disposition of this case. There is accordingly no basis to respondents' motion to dismiss the writ of certiorari outright and thereby leave the judgment of the court of appeals undisturbed. That judgment must now yield to the provisions of the Tax Reform Act.

2. Contrary to respondents' assertion (pp. 7-9), the statements in the floor debates at the time of the passage of the Tax Reform Act do not support their claim that Congress intended that the new statute would not modify the judgment below in this case. As we have pointed out in our motion to vacate and remand (p. 7), Section 1201(a) of the Tax Reform Act provides for public inspection of Internal Revenue Service "written determinations" and "background file documents." The statute establishes a cut-off date as of October 31, 1976, and distinguishes between taxpayer requests for written determinations made on or before and after that date. Disclosure of written determinations requested on or before that date is contingent upon a subsequent appropriation of funds to the Internal Revenue Service. See Section 6110(g) and (h)(1) and (2) (Motion to Vacate, App. 5a-8a). However, Section 1201(b) of the Tax Reform Act provides that the appropriation-of-funds contingency of Section 1201(a) is inapplicable to FOI Act suits, such as this case, that were commenced before January 1, 1976.

The statement of Senator Long cited by respondents (p. 8) simply affirms that disclosure in such cases

is not to await the appropriation of funds. As Senator Long noted, "* * * section 1201(b) assures that section 1201(a) will in no way impede or deter the court ordered disclosure as to all the information sought in the pending cases." See 122 Cong. Rec. S16023 (daily ed., September 16, 1976). Similarly, Representative Duncan observed that FOI Act suits commenced before January 1, 1976, would not "in any way [be] adversely affected by the changes contained in section 1201(a) of the bill by reason of section 1201(b)." See 122 Cong. Rec. H10236 (daily ed., September 16, 1976). It is therefore plain that Congress did not intend to insulate the judgment of the court of appeals in this case from the effect of the substantive rules of the new Act.

Moreover, the language of Section 1201(b) itself refutes respondents' claim (p. 16) that the only effect of the new Act upon this case is to confirm their right "to all of the material covered by the judgments of the lower court." That provision speaks of "[a]ny written determination or background file document." But the definitions of "written determination" and "background file document" set forth in the new Code Section 6110 (b) (Motion to Vacate, App. 3a) do not encompass much of the revenue ruling files or any part of the letter ruling indexing systems sought by respondents. Accordingly, nothing in the language or the legislative history of Section 1201(b) of the Tax Reform Act supports disclosure of all of the documents sought by respondents in this case.

3. Finally, respondents contend that the writ of certiorari should be dismissed because (p. 5) "there would be nothing for the court of appeals to consider should this case be remanded." But there is a disagreement between the parties whether the Tax Reform Act requires disclosure of all of the revenue ruling files and the letter ruling indexing systems sought by respondents. Those questions should be addressed by the court of appeals in the first instance.

Although respondents acknowledge (p. 10) that an indexing system is not a "written determination" or a "background file," they contend that it is not a "return" or "return information," both of which the newly amended Section 6103(a) of the Internal Revenue Code (Motion to Vacate, App. 1a) requires to be kept confidential. In respondents' view, these documents are "agency records" under the FOI Act (5 U.S.C. 552(a)(3)).

However, the remaining issues in this case cannot be resolved by simply characterizing the documents sought by respondents as "agency records" under the FOI Act without regard to whether they are exempt from disclosure. Section 6103(b)(1) (Motion to Vacate, App. 1a-2a) defines the term "return" to include "any tax or information return * * * required by * * * the provisions of this title which is filed with the Secretary * * * ." Moreover, Section 6103(b)(2) defines "return information" to include—

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of * * * liability * * * of any person under this title for any tax * * * or other imposition * * * .

In light of this broad statutory definition of "return information," which became effective on January 1, 1977,[1] we believe that much of the revenue ruling files

[1]See Section 1202(i) of the Tax Reform Act, Pub. L. 94-455, 90 Stat. 1688. The pertinent legislative history (S. Rep. No. 94-938, 94th Cong., 2d Sess. 318 (1976)) states that the new definitions of "return" and "return information" supersede their statutory predecessor and the Treasury Regulations approved by the President that were formerly at issue in this case (see Pet. App. E 32A).

and all of the letter ruling indexing systems will continue to be protected from disclosure under Exemption 3 of the FOI Act— as "matters that are * * * specifically exempted from disclosure by statute." Since respondents dispute this construction of the Tax Reform Act, the appropriate course is to remand the case to the court of appeals for initial resolution of the question whether the revenue ruling files and the letter ruling indexing systems contain "return information" within the meaning of the newly amended Section 6103 (b)(2) of the Code.[2]

[2]While respondents contend (p. 6) that the government "now seeks to reargue its appeal before the court of appeals," the remand proceeding before that court will not involve reconsideration of previously decided issues. To the contrary, the question before the court of appeals on remand will be the effect of the new provisions of the Tax Reform Act with respect to the revenue ruling files and letter ruling indexing systems.

Respondents further argue (p. 6) that the court of appeals has foreclosed the government from raising other exemptions under the FOI Act. But that is not the case. The court of appeals stated that it agreed with the district court that "probably none of the exceptions is applicable to the extent at least that it bars disclosure of the requested documents as a class or group" (Pet. App. B 21A). However, it went on to state (*ibid.*) that it did "not read [the district court's opinion] as meaning * * * that a given specific document which is finally delivered over for *in camera* inspection may not contain material which is excludable as within one of the exempted categories."

For the reasons stated above and in our motion to vacate and remand, the judgment of the court of appeals should be vacated and the case remanded to that court for further consideration of whatever issues may remain unresolved in light of the Tax Reform Act of 1976.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MYRON C. BAUM,
Acting Assistant Attorney General.

STUART A. SMITH,
Assistant to the Solicitor General.

JOSEPH L. LIEGL,
Attorney.

FEBRUARY 1977.